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NO. 05-1618

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JUSTIN JONES, Director of the Oklahoma Department of Corrections,

Petitioner,

v.

LARRY WILSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF LARRY WILSON IN OPPOSITION

Respectfully submitted,

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INTRODUCTION

Larry Wilson's "problem began with what seems an innocuous or even laudable action." Wilson v. Jones, 430 F.3d 1113, 1115 (10th Cir. 2005). He tried to use money in his mandatory-savings account at the Oklahoma Department of Corrections to pay a state court the costs of copying court documents he needed for post-conviction litigation. Id. Mr. Wilson noted this purpose on his request to access his funds. Id. at 1115-16. Oklahoma law permits the use of funds in mandatory-savings accounts to pay fees or costs in a civil or criminal action, and requires clerks of the district courts to charge fees for court-imposed costs and assessments. Id. at 1115 (describing Oklahoma law).

Prison officials nevertheless accused Mr. Wilson, in a disciplinary proceeding, with attempting to obtain money by false pretenses in violation of state law. Id. Based solely on Mr. Wilson's written request, they adjudged him guilty of this Class X misconduct. Id. at 1116.

As the petitioner admits, Petition for Writ of Certiorari ("Pet.") at 6, this conviction carried automatic penalties under state statute and prison regulations that the prison officials had no ability to suspend. Mr. Wilson was automatically demoted from level-four earning status, in which he had

been earning 44 credits a month -- credits that reduced his sentence *day for day* -- to level-one earning status, in which "was statutorily ineligible to earn any credits." Wilson, 430 F.3d at 1116. After thirty days at level one, he could potentially advance to level-two earning status, which enabled him to earn 22 credits a month towards reducing his sentence. Id.; Pet. at 6. But the misconduct conviction barred Mr. Wilson from being placed in either of the two higher levels, even if his conduct otherwise merited advancement, for two years. Wilson, 430 F.3d at 1116; Pet. at 6.

Prison officials also revoked 180 days of Mr. Wilson's earned time and ordered him to serve thirty days of disciplinary segregation. Wilson, 430 F.3d at 1116. This aspect of the punishment was suspended for ninety days and, as Mr. Wilson had clear conduct for that period, was not applied. Id.; Pet. at 6.

The Tenth Circuit determined Mr. Wilson had a liberty interest under the Due Process Clause given the mandatory disqualification from earning credits that reduced his sentence. The court stressed the automatic nature of the disqualification, which allowed for no exercise of discretion by prison officials. Wilson, 430 F.3d at 1116, 1120-21, 1123, 1124. It held that,

under Sandin v. Conner, 515 U.S. 472 (1995), there was the direct and unattenuated effect on the duration of his sentence that supports a liberty interest. Wilson, 430 F.3d at 1121.

In reaching this conclusion, the Tenth Circuit drew a contrast with the situation in Sandin. The circuit observed that this Court had explained that the misconduct conviction there did not require the denial of parole, but was just one factor that officials could consider. Wilson, 430 F.3d at 1118 (discussing Sandin, 515 U.S. at 487). The effect on the duration of the sentence was thus too attenuated and could not support a liberty interest. Id. But here, because the misconduct conviction mandated action that precluded the award of credits that would reduce Mr. Wilson's sentence, there was the requisite direct impact on the length of his sentence. Id. at 1121.

The Tenth Circuit also concluded, based on its earlier decision in Gamble v. Calbone, 375 F.3d 1021 (10th Cir. 2004), that the discipline could not lawfully be imposed, and so there was insufficient evidence in the record to support it. Wilson, 430 F.3d at 1123-24. The conviction therefore did not comport with the due process under the test of Superintendent,

Mass. Correctional Institution at Walpole v. Hill, 472 U.S. 445 (1985). Wilson, 430 F.3d at 1123.

By the time the Tenth Circuit's decision was implemented, Mr. Wilson was about to complete his sentence. His release, with good time required by the decision, came just two days before his sentence was otherwise set to expire.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY REVIEW BECAUSE THE TENTH CIRCUIT CAREFULLY APPLIED THIS COURT'S DECISION IN SANDIN V. CONNER AND BECAUSE THE ISSUE INVOLVED IS NOT ONE OF ANY PRESSING IMPORTANCE.

The petitioner maintains that this case involves the right to be in a particular classification for earning credits towards early release. E.g., Pet. at i, 3-4, 6, 9, 13. He then asserts the Tenth Circuit decided this qualified as a liberty interest by looking for mandatory language in state regulations. Id. at 12. From these premises, the petitioner concludes the Tenth Circuit ran afoul of this Court's decision in Sandin v. Conner.

The petitioner has distorted both the issue and the Tenth Circuit's approach. This case does not involve an assignment to an earning status that can depend on a range of factors, and that arises from the exercise of official discretion. Instead, this case involves the *automatic disqualification* from higher earning levels because of a misconduct conviction, and which *precludes the exercise of discretion*. The only mandatory language the Tenth Circuit considered was that which made automatic this discretion-stripping penalty for the (unconstitutional) misconduct conviction.

Properly viewed, this case poses no conflict whatever with Sandin. The petitioner's argument that it does is fueled by his failure to appreciate the significance of the fact that this case involves action that "inevitably affect[ed] the duration of [the] sentence." Sandin, 515 U.S. at 487. The Tenth Circut made the very inquiry that this Court has directed when the asserted claim is an effect on a sentence's duration. And the circuit's conclusion is supported by this Court's observation of what was, in this regard, lacking in Sandin. The conviction in Sandin, this Court noted, did not require denial of parole. The conviction here did have such a preclusive effect on earlier release.

A. The Tenth Circuit carefully applied Sandin and reached a conclusion consistent with this Court's teachings.

This Court's concern in Sandin was with a search for liberty interests that are protected by the Due Process Clause that is divorced from what is at stake. Sandin, 515 U.S. at 482-84. It is not enough, this Court instructed, that a state rule mandates certain treatment. Instead, State action creates a protected liberty interest only if it implicates an independently weighty interest. Id. at 484. The interest must generally be one that imposes

"atypical and significant hardship" relative to ordinary prison life. Id. This includes disciplinary actions that "inevitably affect the duration of [the] sentence." Id. at 487.

The Tenth Circuit faithfully followed this approach. Its opinion was always focused on the "nature of the deprivation." Id. at 481. The opinion stressed there had to be a direct, unattenuated impact on the sentence for Mr. Wilson to have a liberty interest under Sandin. Wilson, 430 F.3d at 1117, 1119, 1120. Likewise, the opinion tested the effect of the misconduct conviction against this standard. Id. at 1120-21, 1123.

The petitioner is thus quite wrong in portraying this case as a court's search for mandatory regulations for their own sake. The Tenth Circuit did not, as the petitioner would have it, only "purport[]" to invoke the test of an effect on the duration of Mr. Wilson's sentence. Pet. at 12. Rather, this was the true, and eminently correct, "focus[]" of the circuit's opinion. Id.

Of course, the Tenth Circuit also considered whether the misconduct conviction mandated a disqualification from particular earning statuses. But the circuit court could hardly have done otherwise. If the conviction were only a factor prison officials could consider in deciding what credits

could be earned, there would be no inevitable effect on the duration of Mr. Wilson's confinement. There would only be a potential impact on how long he served. The misconduct conviction would be simply one of "a myriad of considerations" that affected what credits he received. Sandin, 515 U.S. at 487. In that scenario, the chance the conviction would "alter the balance" of when Mr. Wilson would be released, would be "too attenuated to invoke the procedural guarantees of the Due Process Clause." Id.

This was the case in Sandin, where the misconduct conviction did not have an automatic impact on parole, but was only a factor the board could consider. This Court emphasized this fact in holding that Hawaii had not created a liberty interest. "Nothing in Hawaii's code requires the parole board to deny parole in the face of a misconduct record or to grant parole in its absence, even though misconduct is by regulation a relevant consideration." Id. (citation omitted).

But what was missing in Sandin is, as the Tenth Circuit held, present here. The misconduct conviction *required* prison officials to demote Mr. Wilson to level one and prevented them from advancing him beyond level two for two years. These consequences -- which made him categorically

ineligible to earn any credits for a month, and made him categorically ineligible to earn credits at higher rates for a full two years -- "occurred solely, automatically, and mandatorily" because of the conviction. Wilson, 430 F.3d at 1121. Just as a regulation that calls for automatic denial of parole on conviction for misconduct implicates a liberty interest, so do the provisions here that automatically prevented Mr. Wilson from earning credits at particular rates regardless of whether he otherwise would be eligible to do so.

The Tenth Circuit correctly applied Sandin. As Judge Easterbrook explained in Montgomery v. Anderson, the credit and parole contexts are analogous: "[a] hope to be released before the expiration of one's terms on good-time credits is no different in principle from a hope to be released on parole." 262 F.3d 641, 645 (7th Cir. 2001). So, the Tenth Circuit was right to look at whether the misconduct conviction disqualified Mr. Wilson from earning credits.

The liberty interest here is not to be "in a particular credit-earning level." Pet. at i. Rather, it is in a disciplinary proceeding that results in the automatic disqualification to be able to earn credits that reduce a sentence.

The analogy to the parole context is again useful. A prisoner does not have a liberty interest in a discretionary parole determination. But a prisoner does have a liberty interest in State action that removes discretion and requires denial of parole.

The petitioner's claim that in deciding there was a liberty interest the Tenth Circuit has thrust itself into the day-to-day management of prisons, Pet. at 8, is erroneous. Misconduct convictions that result in revocation of good-time credits implicate a liberty interest. Wolff v. McDonnell, 418 U.S. 539, 557 (1974). Given that this is a frequent penalty for such disciplinary proceedings, the federal courts routinely review whether such proceedings comport with the Due Process Clause. It was part of the penalty here and, had it not been suspended, there would be no question at all but that there was a liberty interest.

Also, as the Tenth Circuit was at pains to emphasize, this case does not implicate the discretion of prison officials because the regulation mandates demotion and disqualification from advancement in earning status upon conviction. "Prison officials exercised absolutely no discretion over the imposition of these two punishments and had no discretion to

allow Mr. Wilson to avoid them." Wilson, 430 F.3d at 1120-21; see also id. at 1123 ("as we have repeatedly stressed, Mr. Wilson's reclassification did not occur because of an exercise of discretion").

B. The petitioner's other criticisms of the Tenth Circuit's opinion miss the point that, as this Court indicated in Sandin, disqualification from earlier release supports a liberty interest.

Ironically, the petitioner, who unrelentingly criticizes the Tenth Circuit's opinion for considering in any way whether the state regulations have a mandatory effect on the earning of credits, devotes an entire section of his petition to the supposedly non-mandatory nature of the regulations. See Pet. at 13-16. The petitioner maintains the Tenth Circuit has erred in its interpretation of the Oklahoma regulations. Of course, if the petitioner is right that the opinion may be flawed for this reason, then this certainly is not an appropriate case in which to grant review. This Court does not sit to decide the proper interpretation of state regulations.

This argument is conceptually misguided also. The petitioner's point seems to be that Mr. Wilson might for other reasons have been demoted or failed to earn credits at higher rates. But the same argument could be

made in the parole context. State action that precludes parole, it could be asserted, does not implicate a liberty interest because the board might deny parole even were it not for the action. Nevertheless, this Court in Sandin indicated that action that mandated denial of parole gave rise to a liberty interest.

The disqualifying effects of the misconduct conviction here should not be treated differently. As the Tenth Circuit aptly observed, given the "*mandatory* change in credit-earning status . . . the fact that prison officials have discretion to change a prisoner's classification *when considering other conduct* is irrelevant." Wilson, 430 F.3d at 1121 (emphasis in original). The petitioner, as the Tenth Circuit noted, "ignores the fact that Mr. Wilson's conviction resulted in a *mandatory* change in credit-earning status." Id. (emphasis in original).

The petitioner's contention that the Tenth Circuit viewed the effect on the duration of confinement in hindsight, and not prospectively, Pet. at 16-19, likewise fails. This position is largely tied to the one just debunked. The petitioner claims the Tenth Circuit ignored that other decisions could have caused Mr. Wilson's demotion in earning credits. Id. at 17. This is

not meaningfully different from the contention, which Sandin implicitly rejects, that there is no liberty interest implicated by disqualification from parole eligibility because subsequent events might independently result in the denial of parole.

Contrary to what the petitioner maintains, the Tenth Circuit in fact viewed the impact of the misconduct conviction "from the point in time when the action [was] taken." Pet. at 17. At that point, the conviction's preclusive effects going forward were apparent. It was these preclusive effects that gave rise to the liberty interest.

C. The decision in Malchi v. Thaler, which does not address the aspects of Sandin that the Tenth Circuit analyzed, and which simply announces its conclusion, does not provide a good reason to grant review on an issue that is not of pressing concern.

Finally, the petitioner's assertion of a purported conflict between this case and Malchi v. Thaler, 211 F.3d 953 (5th Cir. 2000), see Pet. at 19-21, does not make review appropriate here. The opinion in Malchi does not address the portions of Sandin relied upon by the Tenth Circuit, and discussed in this brief. The opinion does not at all consider the preclusive effect of a misconduct conviction on earning status. It merely announces

the conclusion that the timing of release there was too speculative to create a liberty interest. Malchi, 211 F.3d at 959.

With the debate at best incompletely joined, there is no need for this Court to take up the issue now. The issue is evidently not one of pressing importance, as the petitioner identifies just a single case that supposedly conflicts with the Tenth Circuit's decision. The Tenth Circuit's approach is solidly rooted in Sandin. Any courts to confront the issue in the future will presumably address the reasoning of the decision here. If they do so, and in the event they read Sandin to require a different result, this Court can review the issue then with the benefit of a fuller discourse in the circuit courts.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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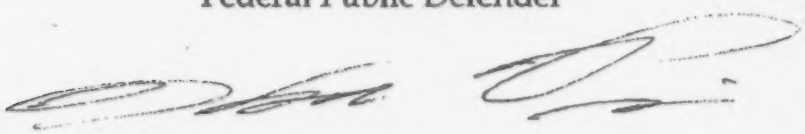

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AFFIDAVIT OF SERVICE

HOWARD A. PINCUS, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth

Circuit was served on counsel for the Petitioner by enclosing a copy of this document in an envelope, first-class postage prepaid and addressed to:

Jennifer B. Miller
Assistant Attorney General
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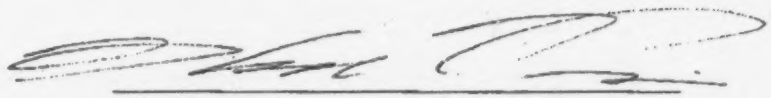
and that the envelope was deposited with the United States Postal Service, Denver, Colorado 80202, on July 20, 2006, and further attests that all parties required to be served have been served.



HOWARD A. PINCUS
Assistant Federal Public Defender

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 20th day of July, 2006.

Socorro L. West
Socorro L. West
Notary Public

My Commission Expires: 11-03-2006

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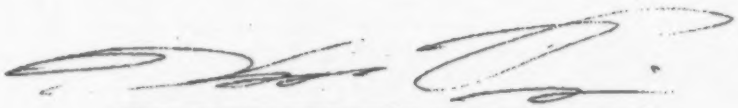
AFFIDAVIT OF MAILING

HOWARD A. PINCUS, Assistant Federal Public Defender, and a member of the bar of the United States Supreme Court, attests that he

placed the foregoing Brief in Opposition in the United States mail on July 20, 2006.



HOWARD A. PINCUS
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STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 20th day of July, 2006.

Socorro L. West
Socorro L. West
Notary Public

My Commission Expires: 11-03-2006